[Cite as *Jones v. Bulbuck*, 2015-Ohio-2134.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

DELORES JONES	C.A. No. 27613
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 2014-06-2754
BRUCE BULBUCK & GERBER COLLISION & GLASS dba True2Form Collision Repair Centers, LLC	
Appellants	

DECISION AND JOURNAL ENTRY

Dated: June 3, 2015

SCHAFER, Judge.

{¶1} Defendants-Appellants, Brock Bulbuck[1] and Gerber Collision & Glass ("Gerber Collision"), d/b/a True2Form Collision Repair Centers, appeal from a judgment of the Summit County Court of Common Pleas denying their motion to vacate judgment. For the reasons that follow, we affirm in part and reverse in part.

I.

{¶2} On June 28, 2012, Delores Jones damaged her 2006 Cadillac CTS in an automobile accident. Gerber Collision was tasked with making the necessary repairs to the vehicle. After making the repairs, Gerber Collision returned the vehicle to Ms. Jones in August of 2012.

[1] Ms. Jones's Complaint erroneously named Brock Bulbuck as "Bruce Bulbuck."

{¶3} In November of 2012, Ms. Jones began experiencing additional problems with her vehicle, such as damage to the electrical system and a defective stabilizer bar and strut. The parties dispute whether these additional problems to Ms. Jones's vehicle were caused by faulty workmanship on the part of Gerber Collision.

{¶4} On April 22, 2013, Ms. Jones's attorney sent a demand letter to Gerber Collision regarding the vehicle damages allegedly caused by their repair work. Gerber Collision forwarded the demand letter to its insurance carrier, which opened a claim file. No response was ever sent in reply to the demand letter, and neither Ms. Jones nor her attorney followed up with Gerber Collision for several months. Due to the lack of communication between the parties, Gerber Collision's insurance carrier closed the claim file in October of 2013, five months after receiving the demand letter.

{¶5} On June 6, 2014, Ms. Jones filed a complaint against Gerber Collision and Mr. Bulbuck in the Summit County Court of Common Pleas. Ms. Jones attempted to serve Gerber Collision's former corporate offices in Cleveland, Ohio via certified mail, but failed to obtain service. Thus, on July 2, 2014, Ms. Jones attempted certified mail service at the Gerber Collision location in Akron, Ohio where her vehicle had been serviced. A receptionist at the place of business signed the certified mail receipt. Gerber Collision's Human Resources Manager and assistant to the company's general counsel subsequently sent an email to the company's insurance carrier in an attempt to forward the complaint, but he inadvertently attached the April 2013 demand letter instead. Having not received the complaint, the insurance carrier failed to file an answer or responsive pleading to the complaint.

{¶6} Just over three months later, on October 14, 2014, Ms. Jones filed a motion for default judgment against Mr. Bulbuck and Gerber Collision. The trial court granted the motion for default judgment on October 16, 2014.

{¶7} On October 29, 2014, Gerber Collision filed a motion to vacate the default judgment entered against it. The trial court summarily denied Gerber Collision's motion on November 13, 2014.

{¶8} Defendants-Appellants filed a timely appeal, raising one assignment of error for review.

II.

ASSIGNMENT OF ERROR

> THE TRIAL COURT ABUSED ITS DISCRETION BY SUMMARILY REJECTING APPELLANTS' MOTION TO VACATE THE DEFAULT JUDGMENT ENTERED AGAINST THEM.

{¶9} In their sole assignment of error, Appellants-Defendants argue that the trial court abused its discretion when it denied their Civ.R. 60(B) motion for relief from default judgment. We agree to the extent that the trial court should have granted the motion to vacate the default judgment as it pertains to Mr. Bulbuck.

Personal Jurisdiction

{¶10} Before addressing the Civ.R. 60(B) standard as it applies to this case, Defendants-Appellants argue that because Mr. Bulbuck was never served with the complaint, the trial court's default judgment entered against Mr. Bulbuck is void for lack of personal jurisdiction. In general, a "trial court is without jurisdiction to render judgment or to make findings against a person who was not served summons, did not appear, and was not a party in the court proceedings." *State ex rel. Ballard v. O'Donnell*, 50 Ohio St.3d 182 (1990), paragraph one of the

syllabus; *see also Maryhew v. Yova*, 11 Ohio St.3d 154, 156 (1984) (stating that personal jurisdiction over the defendant may be acquired either by service of process upon the defendant, the voluntary appearance and submission of the defendant or his legal representative, or by certain acts of the defendant or his legal representative which constitute an involuntary submission to the jurisdiction of the court). While it would have been preferable for Defendants-Appellants to have fully briefed their personal jurisdiction argument with the trial court in their Civ.R. 60(B) motion, it has long been established that if a court renders judgment when it does not have jurisdiction over the parties, the judgment is a nullity and is void *ab initio*. *Lincoln Tavern, Inc. v. Snader*, 165 Ohio St. 61, 64 (1956); *Jacobs v. Szakal*, 9th Dist. Summit No. 22903, 2006-Ohio-1312, ¶ 9. Also, it is within a trial court's inherent authority to vacate a void judgment; a party need not seek relief under Civ.R. 60(B) in order to have the judgment vacated. *Patton v. Diemer*, 35 Ohio St.3d 68, 70 (1988).

{¶11} There is no dispute that Defendants-Appellants did not take any actions to defend or appear in this case. Therefore, service was the only other means for the trial court to acquire personal jurisdiction over Mr. Bulbuck. Service of process must comply with CivR. 4.1 through 4.6. "The plaintiff in a case bears the burden of achieving proper service on a defendant." *Draghin v. Issa*, 8th Dist. Cuyahoga No. 98890, 2013–Ohio–1898, ¶ 21, citing *Cincinnati Ins. Co. v. Emge*, 124 Ohio App.3d 61, 63 (1st Dist.1997). "There is a rebuttable presumption of proper service when the civil rules governing service are followed." *Id.*, citing *Money Tree Loan Co. v. Williams*, 169 Ohio App.3d 336, 2006-Ohio-5568, (8th Dist.), at ¶ 10. But, "even when the rules are complied with, a party is entitled to have the judgment vacated if nonservice is shown." *Id*.

{¶12} When service of process is effectuated upon a *business entity*, Civ.R. 4.2(F)-(I) permits service to be made by serving the entity at any of its usual places of business by a method authorized under Civ.R. 4.1(A)(1). When service of process is effectuated upon an *individual* older than 16 years of age, however, Civ.R. 4.2(A) mandates that service shall be made "by serving the individual." Courts have stated that service of process "must be made in a manner reasonably calculated to apprise interested parties of the action and to afford them an opportunity to respond." *Draghin* at ¶ 20, citing *Akron–Canton Regional Airport Auth. v. Swinehart*, 62 Ohio St.2d 403, 406 (1980). Each case must be examined on its particular facts to determine whether service of process was reasonably calculated to reach the interested party. *Swinehart* at 407.

{¶13} Here, Ms. Jones initially attempted to serve Mr. Bulbuck and Gerber Collision by mailing the summons and complaint via certified mail to Gerber Collision's former corporate offices in Cleveland, Ohio. Ms. Jones failed to obtain service upon either party. Thereafter, Ms. Jones mailed the summons and complaint to the local Gerber Collision location in Akron, Ohio where her vehicle had been serviced.

{¶14} By sending the summons and complaint via certified mail to one of Gerber Collision's usual places of business, Ms. Jones complied with Civ.R. 4.2's requirements. Further, Gerber Collision is not arguing that the service on it was improper due to Jones's failure to serve its statutory agent. Moreover, Ms. Jones's method of service was reasonably calculated to apprise Gerber Collision of the lawsuit against it. This is made manifest by the fact that Gerber Collision's manager of human resources received the complaint and intended to forward it along to the company's insurance carrier. Thus, we determine that Ms. Jones effectuated proper service upon Gerber Collision.

{¶15} However, we cannot say the same regarding Mr. Bulbuck. While Ms. Jones mailed the summons and complaint to one of Gerber Collision's locations, the record indicates that she failed, and did not even attempt, to individually serve Mr. Bulbuck. As Ms. Jones failed to comply with the dictates of Civ.R. 4.2(A), in conjunction with the fact that her lawsuit erroneously names Brock Bulbuck as "Bruce Bulbuck," we conclude that service was not perfected as to Mr. Bulbuck. As such, the trial court had personal jurisdiction over Gerber Collision, but lacked personal jurisdiction over Mr. Bulbuck. The trial court therefore erred in denying Defendants-Appellants' Civ.R. 60(B) motion to vacate as it pertained to Mr. Bulbuck.

Civ.R. 60(B) Application

{¶16} " 'A motion for relief from judgment under Civ.R. 60(B) is addressed to the sound discretion of the trial court, and that court's ruling will not be disturbed on appeal absent a showing of abuse of discretion.' " *Wells Fargo Bank, N.A. v. Clucas*, 9th Dist. Summit No. 27264, 2015-Ohio-88, ¶ 8, quoting *Griffey v. Rajan*, 33 Ohio St.3d 75, 77 (1987). An abuse of discretion indicates that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983). Reviewing courts may not substitute its judgment for that of the trial court when applying the abuse of discretion standard. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621 (1993).

{¶17} Civ.R. 60(B) provides:

> [T]he court may relieve a party * * * from a final judgment * * * for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence * * *; (3) fraud * * *, misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged * * *; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment * * * was entered or taken.

The Ohio Supreme Court has held that "[t]o prevail on a motion brought under Civ.R. 60(B), the movant must demonstrate that: (1) the party has a meritorious defense or claim to present if relief is granted; (2) the party is entitled to relief under one of the grounds stated in Civ.R. 60(B)(1) through (5); and (3) the motion is made within a reasonable time * * *." *GTE Automatic Elec., Inc. v. ARC Industries, Inc.*, 47 Ohio St.2d 146 (1976), paragraph two of the syllabus. "Civ.R. 60(B) relief is improper if any one of the foregoing requirements is not satisfied." *State ex rel. Richard v. Seidner*, 76 Ohio St.3d 149, 151 (1996).

{¶18} Here, we begin by analyzing the second prong of the Ohio Supreme Court's test as it is dispositive of Gerber Collision's assignment of error. Gerber Collision sought relief pursuant to Civ.R. 60(B)(1), arguing mistake, inadvertence, or excusable neglect in failing to file an answer or otherwise defend the action. Gerber Collision maintains that its manager of human resources and assistant to the company's general counsel mistakenly re-sent the 2013 demand letter to the insurance carrier instead of the complaint, and thus the insurance carrier was not aware that they needed to file a responsive pleading. Gerber Collision asserts that this mistake did not constitute a complete disregard for the judicial system.

{¶19} This Court has previously stated:

> [T]here is no bright line test for determining whether a party's reasons for failure to enter an appearance constitute mistake, inadvertence, or excusable neglect. Inadvertence means [a]n accidental oversight; a result of carelessness. Excusable neglect is an elusive concept that is frequently defined in the negative. For example, neglect is inexcusable where the defendant's inaction can be labeled as a complete disregard for the judicial system. [A] trial court properly denies a Civ.R. 60(B)(1) motion where the neglectful party has shown an intentional disregard for the legal process, coupled with a lack of good faith. In determining whether there has been excusable neglect, courts must consider all the surrounding facts and circumstances. These include the amount of time between the last day that an answer would have timely been filed and the date the default judgment was granted, the amount of the judgment awarded, and the experience and understanding of the defendant with respect to litigation matters. In addition, unusual or special circumstances often substantiate a finding of excusable neglect.

> The neglect of an individual to seek legal assistance after being served with court papers is not excusable.

(Internal citations omitted). *Pfizer, Inc. v. Schmidlin*, 9th Dist. Lorain No. 13CA010333, 2013-Ohio-4557, ¶ 6. "[A] determination of excusable neglect will turn on the facts and circumstances presented in each case." *Hopkins v. Quality Chevrolet, Inc.*, 79 Ohio App.3d 578, 582 (4th Dist.1992).

{¶20} After careful review of the record, we determine that the trial court did not abuse its discretion in finding that Gerber Collision has failed to demonstrate excusable neglect. Although a company employee's failure to forward a complaint on to the proper individual or office may amount to neglect, Gerber Collision has failed to explain how its neglect was excusable. Attached to Gerber Collision's Civ.R. 60(B) motion was an affidavit of Terri Agee, a claims adjustor at Gerber Collision's insurance carrier. Ms. Agee attests in her affidavit that:

> *On July 2, 2014, I received an email from [Gerber Collision's general manager and assistant to the general counsel] who informed me there was a lawsuit filed.* Attach [sic] to the email was the April 22, 2013 letter from [Ms. Jones's] counsel but no Summons or Complaint. I assumed the letter was attached simply to provide background on the claim and that they were waiting for service.

(Emphasis added.). Ms. Agee was thus on notice that a lawsuit had been, or at the very least was about to be, filed against Gerber Collision. Nevertheless, whether or not Gerber Collision properly apprised its insurer of a pending matter, thereby presumably invoking coverage, is not relevant to whether or not Gerber Collision's failure to respond in any way to Jones's complaint was excusable. With this information in hand, coupled with the fact that nobody from Gerber Collision or its insurance carrier followed up on the matter for almost four months until a default judgment was entered against the company, we cannot say that the trial court abused its discretion by denying Gerber Collision's Civ.R. 60(B) motion.

{¶21} To the extent that Gerber Collision argues that the trial court erred by failing to hold an evidentiary hearing on its Civ.R. 60(B) motion, the argument is not well-taken. This Court has long recognized that "[a] party moving for relief from judgment under Civ.R. 60(B) is not automatically entitled to an evidentiary hearing." *DeBerte v. DeBerte*, 9th Dist. Summit No. 19461, 2000 WL 422429, *2 (Apr. 19, 2000). "If * * * the material submitted by the movant does not provide operative facts which demonstrate that relief is warranted, the trial court may deny the motion without holding a hearing." *Id.*, quoting *Gaines & Stern Co., L.P.A. v. Schwarzwald, Robiner, Wolf & Rock Co., L.P.A.*, 70 Ohio App.3d 643, 646 (8th Dist.1990). Here, as noted above, the trial court was well within its bounds to determine that Gerber Collision's motion was insufficient to warrant relief under Civ.R. 60(B) for mistake, inadvertence, or excusable neglect.

{¶22} Accordingly, Defendants-Appellants' assignment of error is sustained in part and overruled in part.

III.

{¶23} Appellant-Defendants' sole assignment of error is sustained as it relates to Mr. Bulbuck. The assignment of error is overruled as to Gerber Collision. The judgment of the Summit County Court of Common Pleas is affirmed in part, reversed in part, and the cause is remanded for further proceedings consistent with this opinion.

Judgment affirmed in part,
reversed in part,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to both parties.

JULIE A. SCHAFER
FOR THE COURT

HENSAL, P. J.
WHITMORE, J.
CONCUR.

APPEARANCES:

RONALD D. GREGORY, Attorney at Law, for Appellant.

THOMAS T. MULLEN, Attorney at Law, for Appellee.